

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

POMPTONIAN FOOD SERVICE

Employer-Petitioner

and

Case 22-RM-755

LOCAL 32BJ, SEIU

Union

**ORDER ON REMAND AND
DISMISSAL OF PETITION**

On August 24, 2011, the Board issued an Order Remanding the above-captioned case for the Regional Director to reconsider certain issues and to take action consistent with the Remand Order. Specifically, the Order states that the Director is to reconsider (1) whether the Employer possessed the requisite good faith reasonable uncertainty on October 30, 2009 when the petition was filed and (2) whether Levitz or other Board precedent requires any other form of good faith at the time the petition was filed and if so, whether the requisite good faith was absent based on the Employer's pre-petition withdrawal of recognition.

The Region's previous analysis of the issues in this matter concluded that the RM petition should be processed because the alleged unlawful withdrawal of recognition and unilateral changes by the Employer post-dated the employee petition given to the Employer indicating a lack of majority support which the Employer relied on to file the RM petition. In addition, the Region relied on Truserve, Corporation, 349 NLRB 227 (2007) for the proposition that the settlement of an unfair labor practice charge which includes an affirmative bargaining order remedy---as in this case--- does not require dismissal of a pending petition.

The remand makes it clear that the focus of the analysis should be on whether the Employer possessed the requisite good faith reasonable uncertainty of majority support at the time the petition was filed on October 30, 2009. The remand also says that the Region incorrectly viewed this case

must be received by the Executive Secretary of the Board in Washington, DC by close of business on October 25, 2011, at 5 p.m. (ET), unless filed electronically. Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically. If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations. Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nirb.gov. Once the website is accessed, select the E-Gov tab and then click on E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Newark, New Jersey, October 11, 2011.

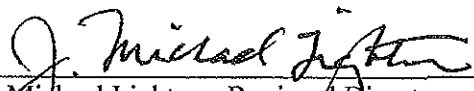

J. Michael Lightner, Regional Director
National Labor Relations Board, Region 22
20 Washington Place, 5th Floor
Newark, NJ 07102

EXHIBIT B

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

IN THE MATTER OF

Pomptonian Food Service 22-CA-29046 & 22-CA-29315

The undersigned Charged Party and the undersigned Charging Party, in settlement of the above matter, and subject to the approval of the Regional Director for the National Labor Relations Board, HEREBY AGREE AS FOLLOWS:

POSTING OF NOTICE — Upon approval of this Agreement and receipt of the Notices from the Region, **which may include Notices in more than one language as deemed appropriate by the Regional Director**, the Charged Party will post immediately in and about its plant/office, including all places where notices to employees/members are customarily posted, and maintain for 60 consecutive days from the date of posting, copies of the attached Notice **(and versions in other languages as deemed appropriate by the Regional Director)** made a part hereof, said Notices to be signed by a responsible official of the Charged Party and the date of actual posting to be shown thereon. In the event this Agreement is in settlement of a charge against a union, the union will submit forthwith signed copies of said Notices to the Regional Director who will forward them to the employer whose employees are involved herein, for posting, the employer willing, in conspicuous places in and about the employer's plant where they shall be maintained for 60 consecutive days from the date of posting. Further, in the event that the charged union maintains such bulletin boards at the facility of the employer where the alleged unfair labor practices occurred, the union shall also post Notices on each such bulletin board during the posting period.

COMPLIANCE WITH NOTICE — The Charged Party will comply with all the terms and provisions of said Notice.

NON-ADMISSIONS CLAUSE — By executing this settlement agreement the Charged Party does not admit that it has violated the National Labor Relations Act, as amended.

SCOPE OF THE AGREEMENT — This Agreement settles only the allegations in the above-captioned case(s), and does not constitute a settlement of any other case(s) or matters. It does not preclude persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters which precede the date of the approval of this Agreement regardless of whether such matters are known to the General Counsel or are readily discoverable. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

CONTRIBUTIONS - PENSION FUND CONTRIBUTIONS - \$1,995.52 including interest.

REFUSAL TO ISSUE COMPLAINT — In the event the Charging Party fails or refuses to become a party to this Agreement, and if in the Regional Director's discretion it will effectuate the policies of the National Labor Relations Act, the Regional Director shall decline to issue a Complaint herein *(or a new Complaint if one has been withdrawn pursuant to the terms of this Agreement)*, and this Agreement shall be between the Charged Party and the undersigned Regional Director. A review of such action may be obtained pursuant to Section 102.19 of the Rules and Regulations of the Board if a request for same is filed within 14 days thereof. This Agreement shall be null and void if the General Counsel does not sustain the Regional Director's action in the event of a review. Approval of this Agreement by the Regional Director shall constitute withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in the above captioned case(s), as well as any answer(s) filed in response.

PERFORMANCE — Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of notice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE — The undersigned parties to this Agreement will each notify the Regional Director in writing what steps the Charged Party has taken to comply herewith. Such notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. In the event the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that no review has been requested or that the General Counsel has sustained the Regional Director. Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in the above captioned case(s).

| | | | |
|---|----------|--|----------|
| Charged Party POMPTONIAN FOOD SERVICE | | Charging Party SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ | |
| By: Name and Title | Date | By Name and Title | Date |
| /s/ Mark Vidovich, President | 3/5/2010 | /s/ Andrew Storm Associate General Counsel | 3/8/2010 |
| Recommended By: | Date | Approved By: | Date |
| /s/ Chevella Brown-Maynor Board Agent | 3/9/2010 | /s/ J. Michael Lightner Regional Director | 3/9/2010 |



NOTICE TO EMPLOYEES



POSTED PURSUANT TO A SETTLEMENT AGREEMENT APPROVED BY A REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose representatives to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain in good faith with Service Employees International Union, Local 32BJ (herein the Union) as the exclusive collective bargaining representative of the employees in the following bargaining unit:

All full-time and regular part-time food service employees of the Employer in the job classifications of cook, driver/food service worker, food service worker/cashier, and food service worker in connection with the Employer's provision of food services at the locations of the South Orange/Maplewood School District; but excluding employees in the job classifications not identified above, managers, confidential and clerical employees, professional employees, casual/substitute employees, employees who are school district students, temporary employees, supervisors, and guards as defined in the National Labor Relations Act.

WE WILL NOT cease contributions to the UNITE HERE Workers National Pension Fund without prior notice to the Union and without affording the Union an opportunity to negotiate and bargain.

WE WILL NOT unilaterally implement a wage increase and grant sick days to the bargaining unit without prior notice to the Union and without affording the Union an opportunity to negotiate and bargain.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive representative of our employees in the above unit with respect to wages, hours and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

WE WILL, on request, rescind any and all unilateral changes we have made in the terms and conditions of employment of the employees in the involved unit.

WE WILL make whole unit employees by making contributions to the UNITE HERE Workers National Pension Fund required under the terms of Article 26 of the collective bargaining agreement that we withheld, and **WE WILL** make employees whole for any losses resulting from our failure to make such payments, with interest.

POMPTONIAN FOOD SERVICE

(Employer)

Dated: _____

By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov and the toll-free number (866) 667-NLRB (6572).

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER.

Veteran's Administration Building, NLRB, 20 Washington Place, 5th Floor, Newark, NJ 07102,
Tel (973) 645-2100. Hours of Operation: 8:30 a.m. to 5:00 p.m.

EXHIBIT C

EPSTEIN BECKER & GREEN, P.C.

ATTORNEYS AT LAW
250 PARK AVENUE
NEW YORK, NEW YORK 10177-1211
212.351.4500
FAX: 212.661.0989
WWW.EBGLAW.COM

STEVEN M. SWIRSKY
TEL: 212.351.4640
FAX: 212.878.8650
SSWIRSKY@EBGLAW.COM

March 5, 2010

VIA ELECTRONIC & US MAIL

Chevella Brown-Maynor
The National Labor Relations Board
Region 22
22 Washington Place, 5th Floor
Newark, NJ 07102-3115

Re: Service Employees International Union, Local 32 BJ and Pomptonian Food
Service
Case Nos. 22-CA-290946 and 22-CA-29315

Dear Ms. Brown-Maynor:

Enclosed please find a copy of the proposed Settlement Agreement in the above referenced Unfair Labor Practice charges, which has been signed today on behalf of Pomptonian Food Service ("Pomptonian") by company President Mark Vidovich.

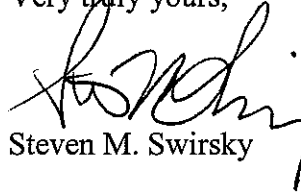
Pomptonian has agreed to enter into and executed this Agreement in reliance upon the representation of charging party Local 32BJ SEIU that this Agreement resolves any and all claims of unfair labor practice activity that have been or could have been raised by it against Pomptonian with respect to any matter occurring through this date. In addition, Pomptonian has agreed to enter into and has executed this Agreement in reliance upon the fact that the National Labor Relations Board shall continue to hold in abeyance the Petition filed by Pomptonian in Case No. 22-RM-755, and that upon the conclusion of the Notice posting period provided for in the Agreement said Petition shall be processed by the Board.

It is our understanding that the Regional Director shall at this time convey the Agreement to the Charging Party for it to sign and enter into the Agreement as well, and that if the Charging Party does not enter into the Agreement on a timely basis, i.e. within seven days, that the Agreement and the settlement shall be approved as a unilateral settlement. I ask that you please keep me apprised as to whether and when the Charging Party enters into the Agreement and the date that the Regional Director approves the Agreement. We understand that the Region

Chevella Brown-Maynor, Esq.
March 5, 2010
Page 2

will now prepare and forward to Pomptonian the actual Notices for posting following the approval of the Agreement.

Very truly yours,

A handwritten signature in black ink, appearing to read "S. Swirsky", written over the typed name.

Steven M. Swirsky

SMS:sgw
Enclosure



NOTICE TO EMPLOYEES



POSTED PURSUANT TO A SETTLEMENT AGREEMENT APPROVED BY A REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT
FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union;
Choose representatives to bargain with us on your behalf;
Act together with other employees for your benefit and protection;
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain in good faith with Service Employees International Union, Local 32BJ (herein the Union) as the exclusive collective bargaining representative of the employees in the following bargaining unit:

All full-time and regular part-time food service employees of the Employer in the job classifications of cook, driver/food service worker, food service worker/cashier, and food service worker in connection with the Employer's provision of food services at the locations of the South Orange/Maplewood School District; but excluding employees in the job classifications not identified above, managers, confidential and clerical employees, professional employees, casual/substitute employees, employees who are school district students, temporary employees, supervisors, and guards as defined in the National Labor Relations Act.

WE WILL NOT cease contributions to the UNITE HERE Workers National Pension Fund without prior notice to the Union and without affording the Union an opportunity to negotiate and bargain.

WE WILL NOT unilaterally implement a wage increase and grant sick days to the bargaining unit without prior notice to the Union and without affording the Union an opportunity to negotiate and bargain.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive representative of our employees in the above unit with respect to wages, hours and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

WE WILL, on request, rescind any and all unilateral changes we have made in the terms and conditions of employment of the employees in the involved unit.

WE WILL make whole unit employees by making contributions to the UNITE HERE Workers National Pension Fund required under the terms of Article 26 of the collective bargaining agreement that we withheld, and WE WILL make employees whole for any losses resulting from our failure to make such payments, with interest.

POMPTONIAN FOOD SERVICE
(Employer)

Dated: 3/5/10

By:

Phil Tan President
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov and the toll-free number (866) 667-NLRB (6572).

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Veteran's Administration Building, NLRB, 20 Washington Place, 5th Floor, Newark, NJ 07102,
Tel (973) 645-2100. Hours of Operation: 8:30 a.m. to 5:00 p.m.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

IN THE MATTER OF

Pomptonian Food Service 22-CA-29046 & 22-CA-29315

The undersigned Charged Party and the undersigned Charging Party, in settlement of the above matter, and subject to the approval of the Regional Director for the National Labor Relations Board, HEREBY AGREE AS FOLLOWS:

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COMPLIANCE WITH NOTICE — The Charged Party will comply with all the terms and provisions of said Notice.

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CONTRIBUTIONS - PENSION FUND CONTRIBUTIONS - \$1,995.52 including interest.

REFUSAL TO ISSUE COMPLAINT — In the event the Charging Party fails or refuses to become a party to this Agreement, and if in the Regional Director's discretion it will effectuate the policies of the National Labor Relations Act, the Regional Director shall decline to issue a Complaint herein (or a new Complaint if one has been withdrawn pursuant to the terms of this Agreement), and this Agreement shall be between the Charged Party and the undersigned Regional Director. A review of such action may be obtained pursuant to Section 102.19 of the Rules and Regulations of the Board if a request for same is filed within 14 days thereof. This Agreement shall be null and void if the General Counsel does not sustain the Regional Director's action in the event of a review. Approval of this Agreement by the Regional Director shall constitute withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in the above captioned case(s), as well as any answer(s) filed in response.

PERFORMANCE — Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of notice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE — The undersigned parties to this Agreement will each notify the Regional Director in writing what steps the Charged Party has taken to comply herewith. Such notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. In the event the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that no review has been requested or that the General Counsel has sustained the Regional Director. Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in the above captioned case(s).

| | | | |
|---|----------------|--|------|
| Charged Party POMPTONIAN FOOD SERVICE | | Charging Party SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ | |
| By: Name and Title <i>Mark Vabit</i> President | Date 3/5/10 | By Name and Title | Date |
| Recommended By: Board Agent | Date | Approved By: | Date |
| | | Regional Director | |

EXHIBIT D

From: Manny Pastreich [<mailto:mpastreich@seiu32bj.org>]
Sent: Friday, July 02, 2010 11:05 AM
To: Howard Grinberg
Cc: Jason Turi
Subject: RE: SOM SEIU

Howard,

I surely did not mean in any way to convey that negotiations are contingent on what Pomptonian does with RM petition. We have never made that a contingency and still do not.

We remain ready and willing to bargain and as I mentioned, we have been waiting for a date.

To move this along, here are some dates we could be available.

July 16th
Aug 12th

Manny

From: Howard Grinberg [<mailto:hgrinberg@pomptonian.com>]
Sent: Thursday, July 01, 2010 12:24 PM
To: Manny Pastreich
Cc: Candy Vidovich
Subject: SOM SEIU

Dear Manny,

With regard to our conversation yesterday, Pomptonian has been and continues to be willing to negotiate. This negotiation cannot be, as you suggested, contingent upon our withdrawing the RM petition.

If you remove this stipulation, we would be pleased to set up a negotiation session with you. Please list some available dates and times, so that we can compare calendars.

Best regards,

Howard Grinberg
Director of Operations

From: Manny Pastreich [<mailto:mpastreich@seiu32bj.org>]
Sent: Wednesday, September 22, 2010 2:49 PM
To: Howard Grinberg
Subject: Bargaining

Howard,

I offered to send you language on a side agreement about postings related to dues and back up of my statement that we had a duty to represent everyone even if they don't pay dues (bargaining, grievances, etc).

The relevant part of the PDF document attached is the second full paragraph on 7th page (page 402) that describes our duty. Below, is suggested language for a side letter that would be acceptable to us to put both the RM Petition and the Dues issue to bed.

Let me know if this helps move things along.

Manny

Proposed Side Letter to Agreement

This will confirm our understanding that throughout the term of the collective bargaining agreement, the Union will maintain a notice on the bulletin board provided by the Employer advising employees of their rights under the U.S. Supreme Court's decision in *Communication Workers v. Beck*, 487 U.S. 735 (1988).

The Employer will immediately withdraw its RM petition currently before the NLRB (Case 22-RM-755).

<<IBEW Local 2088 218 NLRB 396.pdf>>

From: Howard Grinberg [mailto:hgrinberg@pomptonian.com]

Sent: Wednesday, September 29, 2010 1:15 PM

To: 'Manny Pastreich'

Subject: South Orange

Dear Manny,

Thank you for your recent e-mail regarding one of the issues that we had discussed during the negotiation sessions. The language is not what we were looking for. We were asking for the removal of the Union Security Clause, allowing people not to join the Union and not to pay any dues at all if that is their choice.

Also, as we have mentioned in our many conversations, Pomptonian does not intend to withdraw from the RM petition, since a large number of the staff members have expressed an interest in seeing a secret ballot election proceed.

Best regards,

Howard Grinberg
Director of Operations



3 Edison Place
Fairfield, NJ 07004
P - 973-882-8070
F - 973-882-6646

EXHIBIT E



United States Government
NATIONAL LABOR RELATIONS BOARD

Region 22
20 Washington Place, 5th Floor
Newark, NJ 07102-3115
Telephone: 973-645-2100

RECEIVED
NOV - 9 2010
BY: _____

November 5, 2010

Steven M. Swirsky, Esq.
Epstein Becker & Green PC
250 Park Avenue
New York, NY 10177

Re: Pomptonian Food Service
Cases 22-CA-29046, 22-CA-29315

Dear Mr. Swirsky:

After a review of all aspects of compliance in the above-captioned case, it has been determined that the Employer has met its obligations with regard to all terms and provisions of the Settlement Agreement in this matter.

Accordingly, this matter is hereby closed and will remain closed, conditioned upon continued compliance. In the event that subsequent violations of the National Labor Relations Act occur, this matter may be reopened.

Very truly yours,


Julie Kaufman
Acting Regional Director

cc: Rich Ward, Director of Operation
Pomptonian Food Service
3 Edison Place
Fairfield, NJ 07004

Service Employees International
Union Local 32BJ
1 Washington Park 12th Floor, Suite 1203
Newark, NJ 07102

Andrew Strom, Esq.
Associate General Counsel
Service Employees International Union, 32B-32J
101 Avenue of Americas
New York, NY 10013

EXHIBIT F

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

POMPTONIAN FOOD SERVICE

Employer-Petitioner

and

Case 22-RM-755

LOCAL 32BJ, SEIU

Intervenor/Union

NOTICE TO SHOW CAUSE

Counsel for the Union in this matter submitted a letter dated October 15, 2010, requesting that the instant Petition be dismissed. A copy of the letter is attached and I am considering the letter as a Motion to Dismiss the Petition and requesting that the parties submit their positions to me regarding this Motion.

The following information is provided as background to the filing of the petition. In or about late April, 2009, the Employer was presented with an employee-signed petition indicating that a majority of the unit employees no longer wished to be represented by the Union. The Employer sent a letter to the Union dated May 11, 2009 stating that it intended to withdraw recognition from the Union based on the petition, effective at the expiration of the contract on August 31, 2009. Sometime between May 11th and August 31st, the Union sent a petition to the Employer showing that a majority of unit employees now supported the Union. The Employer asserted that the Union had coerced employees into signing that petition and withdrew recognition on August 31st. The Employer subsequently filed this RM Petition on October 9, 2009, based on the employee-signed petition it had received in late April, 2009.

Processing of the Petition was pended because of two related unfair labor practice charges filed by the Union. Case 22-CA-29046, alleged that the Employer unlawfully failed and refused to bargain with the Union, at its Maplewood/South Orange, New Jersey school district locations, by refusing to negotiate a successor collective bargaining agreement with the Union and unlawfully withdrawing recognition from the Union at a time when it could not be demonstrated that a majority of the unit employees no longer supported the Union as their bargaining representative, in violation of Section 8(a)(1) and (5) of the Act. The Region's investigation of this charge concluded that the Union had reestablished its majority support with the unit employees at the time the Employer withdrew recognition at the expiration of the contract on August 31, 2009 and there was no evidence that the support had been obtained through coercion. Accordingly, the Region found that the Employer's withdrawal of recognition was unlawful.

In Case 22-CA-29315, the Union alleged that the Employer unlawfully failed and refused to bargain with the Union by unilaterally (1) discontinuing to make pension fund contributions, (2) implementing wage increases and (3) granting sick days to employees. Those charges were also found to be meritorious by the Region. On March 9, 2010 the Regional Director approved a Settlement Agreement entered into by the parties that provided a full remedy of the allegations involved, including an affirmative bargaining obligation and the posting of a Notice to Employees. Thereafter, this office implemented the terms of the settlement agreement and the unfair labor practice cases were closed on compliance on November 5, 2010.

In his Motion, counsel for the Union contends that the settlement of the unfair labor practices requires dismissal of the instant Petition. Counsel asserts that the imposition of an affirmative bargaining order as a part of the settlement precludes the consideration of the

question concerning representation raised by the Petition. Counsel further contends that the instant Petition was tainted by the unfair labor practices that gave rise to the charges and the settlement and, thus, the Petition must be dismissed. In its Motion, the Union relies on the Board's decision in *HQM of Bayside, LLC*, 348 NLRB 758 (2006) in support of its contention that when the Board imposes an affirmative bargaining obligation, there is no longer a question concerning representation and, therefore, a Petition challenging a union's presumed majority status may not be entertained. Further, the Union contends that the instant Petition must be dismissed inasmuch as it was filed on October 9, 2009, about five months after the Employer's anticipatory withdrawal of recognition that occurred in May 2009 and that ultimately turned out to be unlawful and the subject of the settlement agreement referenced above. In this regard, the Union asserts that, in filing the instant Petition the Employer may not rely upon any good faith reasonable uncertainty about the Union's continuing majority status that may have existed in May, 2009, since the Union had notified the Employer that it had reestablished its majority status among the employees by the time the Petition was filed in October, 2009 and the Union's uncoerced majority status was confirmed by the Region in its investigation of the above unfair labor practice charges.

The Employer contends that processing of the instant Petition should be resumed inasmuch as (1) the instant Petition was filed in a timely manner, and (2) the alleged recognition-related conduct by the Employer postdates the showing of interest and should not affect the filing of the Petition and does not warrant dismissal of the Petition.

Under Section 9(c)(1) of the Act, conducting an election pursuant to a Petition is conditioned upon finding that a question concerning representation exists. The assertions raised

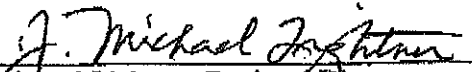
by the Union generate substantial and material issues of fact and law as to whether further processing of the Petition is warranted. Accordingly,

IT IS HEREBY ORDERED that any party involved in this matter provide written cause of its legal position and argument as to whether the instant Petition warrants continued processing. Any submission should be accompanied by supporting documentary evidence, cite relevant and applicable legal authority, and, in particular, should address the issues articulated herein, including the following:

1. Is there a reasonable cause to believe that a question concerning representation existed at the time the Petition was filed? On what basis?
2. Does settlement of the referenced unfair labor practice allegations require dismissal of the instant Petition? On what basis? Does the Board caselaw in *Truserv Corporation*, 349 NLRB 227, or *Big Three Industries*, 201 NLRB 197 apply here?
3. Please address whether further processing of the instant Petition is inconsistent with the Region's finding that the Union had reestablished its majority status by the filing date of the Petition?

Any submission must be received in this office by the close of business on December 13, 2010, with a copy to the other parties being simultaneously served.

Dated at Newark, New Jersey this 1st day of December, 2010.


J. Michael Lightner, Regional Director
National Labor Relations Board, Region 22
20 Washington Place, 5th Floor
Newark, NJ 07102

Attachments



SERVICE EMPLOYEES
INTERNATIONAL UNION
CWA, CLC

MICHAEL R. FISHMAN
President

KEVIN J. DOYLE
Executive Vice President

HÉCTOR J. FIGUEROA
Secretary-Treasurer

VICE PRESIDENTS
KYLE BRAGG
GEORGE FRANCISCO
LENORE FRIEDLAENDER
BRIAN LAMBERT
VALARIE LONG

LARRY ENGELSTEIN
Assistant to the President

Local 32BJ Headquarters
101 Avenue of the Americas
New York, NY 10013-1991
212.388.3800

Writer's Direct Dial: 212.388.3025

October 15, 2010

Via Fax (973) 645-3852 Only

Michael Lightner
Regional Director
NLRB Region 22
20 Washington Place, 5th floor
Newark, NJ 07102-2570

Re: Pomptonian Food Service
Case 22-RM-755

Dear Mr. Lightner:

I am writing on behalf of Service Employees International Union, Local 32BJ ("Local 32BJ" or "the Union") to set forth the Union's views as to why the above-referenced petition should be dismissed.

The petition was filed on October 30, 2009, but processing of the petition was blocked by the unfair labor practice in Case 22-CA-29046. The Region ultimately found merit to the charge that Pomptonian had prematurely withdrawn recognition from Local 32BJ, and the Region entered into a settlement with Pomptonian that imposed an affirmative bargaining obligation on Pomptonian.

ARGUMENT

A. The Settlement of the Unfair Labor Practice Requires Dismissal of the RM Petition.

The remedy in the ULP case was modeled on the remedy imposed by the Board in *HQM of Bayside, LLC*, 348 NLRB 758 (2006). In *HQM of Bayside*, the Board explained that one purpose of imposing an affirmative bargaining obligation is to "remove[] the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union, and it ensures that the Union will not be pressured to achieve immediate results at the bargaining table - results that might not be in the employees' best interests." *Id.* at 762. Where the Board or the Region imposes an affirmative bargaining obligation, by definition, there is no longer a question concerning representation, and thus, on that basis the RM petition must be dismissed.

The Board's decision in *Truserv Corp.*, 349 NLRB 227 (2007) is not to the contrary for two reasons. In *Truserv*, the Board held that the settlement of an 8(a)(5) charge did not provide a basis for dismissing a decertification petition filed by employees prior to the settlement. *Truserv* has no application here because it

Office of the General Counsel

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New York, NY 10013-1906
Fax: 212.388.2062

October 15, 2010

Page 2

involved an RD petition rather than an RM petition. The Board majority in *Truserv* expressed concern that "the petitioner be bound to a settlement by others that purports to waive the petitioner's right under the Act to have the decertification petition processed." *Id.* at 232, n. 14. Here, there is no concern about the settlement waiving the rights of employees because the RM petition was filed by the employer. A second reason why *Truserv* does not apply here is that the settlement in *Truserv* did not include an affirmative bargaining obligation imposed by the Board. Here, as explained above, the affirmative bargaining obligation in the settlement precludes any question concerning representation.

B. The RM Petition Should Be Dismissed Because it Was Tainted by the Employer's Unlawful Conduct.

Apart from the question of whether the settlement necessitates dismissal of the decertification petition, there is a separate basis for dismissing the decertification petition – the petition was tainted by the unfair labor practice that gave rise to the settlement. The facts are as follows: Pomptonian announced on May 11, 2009 that it intended to withdraw recognition upon the expiration of the collective bargaining agreement effective August 31, 2009. After that announcement, Pomptonian unlawfully refused to bargain a successor agreement. As explained by the Board in *HQM of Bayside*, Pomptonian took those actions at its peril because its actions would only be lawful if the Union had actually lost majority support by the time the contract expired. Pomptonian did not file its RM petition until October 30, 2009 – more than five months after the anticipatory withdrawal of recognition that turned out to be unlawful.

Even if Pomptonian was relying upon a showing of interest that predated its unlawful acts, the RM petition is still tainted because an employer may only file an RM petition where it can demonstrate "good-faith reasonable uncertainty" as to the union's continuing majority status. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 717 (2001). Pomptonian was required to harbor its good faith uncertainty at the time it filed its petition. Yet, Pomptonian's unlawful acts precluded any good faith uncertainty. *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996) ("Any such doubt must be raised in a context free of unfair labor practices of the sort likely, under all the circumstances to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself"). It may well be that in May 2009, Pomptonian did have good faith uncertainty about the wishes of its employees. But, its unlawful withdrawal of recognition was conduct that "would tend to unfairly undermine continuing support for the Union." *HQM of Bayside*, 348 NLRB at 761; accord *Lee Lumber*, 322 NLRB at 177. Thus, if not for Pomptonian's unlawful acts, support for the Union by October might well have rebounded to the point where there would be no doubt whatsoever about the Union's majority status.

Since Pomptonian's unlawful acts precluded the existence of any good faith doubt, its petition must be dismissed.

Sincerely,



Andrew Strom
Associate General Counsel

EXHIBIT G

NATIONAL LABOR RELATIONS BOARD
REGION 22

| | | |
|--------------------------|---|--------------------|
| POMPTONIAN FOOD SERVICE, | X | |
| | : | |
| Employer-Petitioners, | : | |
| | : | Case No. 22-RM-755 |
| - against - | : | |
| | : | |
| LOCAL 32BJ, SEIU, | : | |
| | : | |
| Intervenor-Union. | : | |
| | X | |

**RESPONSE OF POMPTONIAN FOOD SERVICE TO NOTICE TO SHOW CAUSE
DATED DECEMBER 1, 2010**

Pomptonian Food Service ("Pomptonian"), by its attorneys Epstein, Becker & Green, P.C., submits this Response to the Notice to Show Cause dated December 1, 2010 (the "Notice") issued by the Regional Director of Region 22 of the National Labor Relations Board. The Notice states that it was issued in response to an October 15, 2010, letter to the Regional Director, sent *ex parte* by counsel for Local 32BJ SEIU ("Local 32BJ" or the "Union"), which the Regional Director has now determined shall be treated as a motion to dismiss the Petition filed by Pomptonian on October 30, 2009. The Notice directs the parties to set forth their positions and argument "as to whether the instant Petition warrants further processing" and, in particular, to address the following questions:¹

¹ In the Notice, the Regional Director describes the Notice as having been issued in response to an October 15, 2010 letter from the Union's counsel, as to which "I am considering the [Union's October 15, 2010] letter as a Motion to Dismiss the Petition...." The Notice does not cite any section of Act, the Board's Rules and Regulations or any other authority as authorizing the Regional Director to issue a Notice to Show Cause more than six weeks after the so-called *ex parte* motion was filed or to proceed in any manner other than issuing a Notice of Hearing to allow for the development of a full and complete record to the extent these issues may need to be considered by the Board. In fact, the Notice is procedurally defective and fails to comply with Section 102.65 of the Board's Rules and Regulations because the Union failed to serve its "motion" on Pomptonian. Also, the Union's motion was filed approximately three weeks before the Region issued its November 5, 2010 closing letter with respect to the Settlement Agreement in Cases No. 22-CA-28977 and 22-CA-29046, almost two months before the Region informed Pomptonian of the fact that the Union had made such a motion or provided a copy to Pomptonian as an attachment to the December 1, 2010 Notice to Show Cause, and almost one year after Pomptonian filed the Petition.

1. Is there a reasonable cause to believe that a question concerning representation existed at the time the Petition was filed? On what basis?
2. Does settlement of the referenced unfair labor practice allegation require dismissal of the instant petition? On what basis? Does the Board case law in *Truserv Corporation*, 349 NLRB 227, or *Big Three Industries*, 201 NLRB 197 apply here?
3. Please address whether further processing of the instant Petition is inconsistent with the Region's finding that the Union had reestablished its majority status by the filing date of the Petition?

It is clear, for the reasons set herein that a valid question concerning representation existed among the unit of Pomptonian employees described in the Petition at the time that Pomptonian filed the Petition (and continues to exist at this time) because, *inter alia*, its employees had presented Pomptonian with a petition signed by a majority of the employees in the South Orange-Maplewood School District (the "District") covered by its contract with the Union stating that they no longer wished to be represented by the Union for collective bargaining purposes, and because even after the Union subsequently presented Pomptonian with an undated petition signed by a majority of the employees in the Unit stating that they did want to be represented by the Union if the employees who had only signed the petition asking Pomptonian to withdraw recognition were counted, reasonable uncertainty arose and has continued to exist as to the Union's representative status, which under *Levitz* could only be resolved through a Board conducted secret ballot representation election.

The non-admission settlement of the allegations of Cases No. 29046 that were resolved by the non-admission Settlement Agreement Pomptonian entered into in March 2010 does not require the dismissal of the Petition. There can be no question that reasonable

A party asserting fraud, misconduct or supervisory taint in connection with a showing of interest must take early action in raising such allegations *General Dynamics Corp*, 213 NLRB 851 (1974). Pomptonian also takes issue with the summary of facts contained in the Notice for a number of reasons, including *inter alia*, the fact that it asserts as fact disputed allegations that were not established as fact in any representation case or other proceeding.

uncertainty continued to exist and Board law permits and indeed requires the processing of the Petition. The processing of the Petition would in no way be inconsistent with the Region's conclusion during the processing of the Charges that the Union had re-established its majority status in the unit at the time that Pomptonian filed the Petition.

Indeed, it is clear that in reality the Union's motion to dismiss the Petition is nothing more the latest action in an ongoing course of conduct intended to deny the employees in the Unit their right to decide whether or not they want to continue to be represented by the Union.² Accordingly, for each of these reasons, the Union's motion should be denied and the Petition should be processed without further delay, so that the unit employees may decide in a Board conducted secret ballot election whether or not they will continue to be represented by the Union. Good faith reasonable uncertainty continues to exist as to the Union's continued majority status to support its Petition based on the employees' petitions stating that they no longer wanted to be represented by Local 32BJ.

Moreover, the Settlement of the Union's unfair labor practice charges clearly does not require the dismissal of the Petition as the Union now contends. To the contrary, the Board's decision in *Truserv Corporation* coupled with the following facts warrant the continued processing of the Petition: (1) Pomptonian entered into and executed the Settlement Agreement with the Region with the express understanding that the Region would continue the processing of the Petition after Pomptonian had fulfilled its obligations under the Settlement Agreement, (2) the Settlement Agreement contained a non-admissions clause, (3) the Settlement Agreement did not require withdrawal of the Petition, and (4) not only has there been no finding by the Board

² Indeed, the Union has continued to condition good faith bargaining on Pomptonian's agreement to withdraw the Petition, putting this in writing as recently as December 12, 2010.

that Pomptonian violated the Act or that the Petition was tainted, but the Region investigated what was arguably the Union's most serious claim, which it raised in its Charge in Case No. 22-CA-28977, *i.e.* that the petition signed by a majority of the unit employees and presented to Pomptonian during March 2009, was tainted by employer support and/or participation, and that Pomptonian discriminated against those employees who supported the Union and found those allegations to be unsupported by the evidence.

Accordingly, Pomptonian submits that the Region should dismiss the Union's October 15, 2010 Motion to Dismiss the Petition and resume processing of the Petition forthwith to allow the Unit employees the right to decide whether they wish to be represented in a Board conducted election.

I. BACKGROUND OF THE PETITION AND THE SETTLEMENT AGREEMENT

A. The Employee Petition

The Unit employees are employed by Pomptonian in connection with its contract to provide school lunch services for the South Orange Maplewood School District (the "District"). The employees, who are employed on either a full-time or part-time basis, are generally employed from the start of the school year at the beginning of September through the conclusion of the school year in June, with employees laid off on a staggered basis at the end of the school year.

Shortly after Pomptonian began operations in the District, it voluntarily recognized the Union based upon the fact that it had hired a majority of the employees who had been employed by Sodexo, the District's previous vendor.³ Pomptonian and the Union entered

³ The Sodexo-Local 32BJ contract contained a union security clause.

into there an initial collective bargaining agreement for the term September 1, 2007 through August 31, 2009. That contract largely tracked the terms of the unexpired contract between Sodexo and the Union.

In late April 2009, Pomptonian was presented by Unit employees with petitions bearing the dated signatures of more than 50% of the Unit employees working in the District. Those petitions, copies of which Pomptonian provided to Region 22 during its investigation of the ULP charges filed by the Union, explicitly and unambiguously stated that the employees who had signed them no longer wished to be represented by the Union for purposes of collective bargaining. After Pomptonian confirmed that the signatures on the petitions were authentic, and in reliance upon such objective evidence and consistent with the Board's holding in *Levitz Furniture*, Pomptonian advised the Union by letter dated May 11, 2009, a copy of which has already been provided to Region 22, that inasmuch as it had determined on the basis of objective evidence that a majority of the employees in the Unit no longer supported or wished to be represented by the Union, Pomptonian was withdrawing recognition from the Union, with such withdrawal of recognition to be effective upon the expiration of the CBA on August 31, 2009. There is no dispute that Pomptonian continued to fully comply with all of the terms of the CBA through the expiration of the contract.

B. Local 32BJ's Counter Petition

The Union subsequently sent Pomptonian a group of undated counter-petitions, claiming that employees had changed their minds and that a majority of the Unit employees once again wished to be represented by the Union. Based on those undated petitions, the Union demanded that Pomptonian restore recognition. At no time did the Union ever offer any evidence as to when its petitions were actually signed.

Some of the employees whose signatures were on the Union petitions had also signed the dated petitions that had previously been given to Pomptonian by the employees. However, as the Board acknowledged during the investigation of the Charges, more than 30% of the Unit employees only signed the petitions asking Pomptonian to withdraw recognition and not the undated petitions supporting the Union. Thus, it is clear under *Levitz*, that at the time that Pomptonian received those undated petitions from the Union, Pomptonian could have filed an RM petition based upon the good faith uncertainty that existed as to the Union's continued majority status created by the conflicting petitions and that the Region would have processed an RM petition at that time.

Moreover, during the period that the Union was collecting signatures, a number of Unit employees came forward and told Pomptonian that Union representatives had threatened them that they would lose their jobs if they did not sign the Union counter-petition and that they had only signed the Union's counter-petition because of those threats. Pomptonian has provided the Region with detailed information as to the specifics of these reports from employees.

Based on all of the facts and circumstances, including its good faith doubt as to the Union's claim that it was supported by an uncoerced majority of the employees in the Unit, Pomptonian informed the Union that it would not restore recognition and suggested to the Union that if it did in fact believe that it was supported by a majority of the Unit employees, the Union should, at the appropriate time, file a representation petition with the NLRB so that the employees in the Unit could resolve the question in a Board conducted election. We have already provided copies of the correspondence and documentation concerning these events to the Region during its investigation of the various Charges filed by the Union.

C. The Unfair Labor Practice Charges

Instead, on or about June 24, 2009, Local 32BJ filed Charge No. 22-CA-28977 in which it alleged that Pomptonian had violated Section 8(a)(1) of the Act by "unlawfully promoting decertification," allowing employees to solicit signatures on anti-union petitions on Company time and by "prohibiting pro-union employees from even discussing the Union." Pomptonian denied these allegations and presented evidence that it had neither supported or assisted the anti-union nor prohibited supporters from talking about the Union.

On or about August 6, 2009, Local 32BJ filed Charge No. 22-CA-29046 alleging that Pomptonian violated Sections 8(a)(1) and (5) of the Act by unlawfully refusing to bargain with the Union for a new agreement to succeed the parties' CBA, which was due to expire on August 31, 2009. In response to this charge Pomptonian presented evidence that it had prospectively withdrawn recognition from the Union based upon objective evidence that a majority of the employees who occupied unit positions in the District had voluntarily signed clear and unambiguous petitions stating that they no longer wished to be represented for bargaining by the Union. Pomptonian also informed the NLRB that it was not legally obligated to restore the Union's recognition because of the fact, *inter alia*, that the Union's subsequent counter-petitions were the product of coercion and threats by the Union.

Following its investigation of the Charges the Region informed the parties that it had found the Union's claims that Pomptonian had promoted and/or assisted the circulation of the petitions against further representation to be unsupported by the evidence. It also informed the parties that it was prepared to issue a complaint with respect to Pomptonian's withdrawal of recognition of the Union and its refusal to bargain following the expiration of the 2007-2009 CBA.

D. The RM Petition in Case No. 22-RM-755

While the Charges were under investigation, on October 31, 2009, Pomptonian filed a RM Petition in Case No. 22-RM-755. In support of the Petition, Pomptonian relied upon the employee petitions unequivocally stating that they no longer wanted to be represented by Local 32BJ for the purposes of collective bargaining. As Pomptonian advised the Region at the time, Pomptonian filed the Petition with the object of allowing for a resolution of the question of whether or not its employees in the District wanted to be represented by the Union. At the time that this Petition was filed, the Region was actively investigating Pomptonian's Charges No. 22-CA-28977 and 29046, and those Charges initially blocked the processing of the Petition. The Region's investigation included the allegation that employees in the Unit had come forward to managers and informed them that they had been threatened with loss of their employment if they did not sign the Union's counter-petition. Pomptonian supervisors and unit employees who were subpoenaed by Region 22 provided sworn statements describing threats that they had received and/or been told of by others who had been threatened to coerce them to sign the Union's petition.

E. The Settlement Agreement

Following the completion of the Region's investigation of the Charges, the Regional Office informed Pomptonian that it was prepared, absent settlement, to issue a Complaint alleging violation of Sections 8(a) (1) and (5) of the act, by withdrawing recognition at the conclusion of the CBA on August 31, 2009. It also told the parties that the allegations of support for the anti-Union petitioners in 22-CA 28977 were not supported by the evidence.

Pomptonian entered into settlement discussions with the Regional Office at that time. One of the issues that Pomptonian raised in those discussions was what impact the

decision to issue a Complaint absent settlement and an agreement by Pomptonian to enter into a Settlement Agreement prior to the issuance of a Complaint would have on the still pending Petition. On March 9, 2010, the Regional Director approved the settlement of Charge Nos. 22-CA-28977 and 22-CA-29046, pursuant to which Pomptonian agreed it would restore recognition and, upon request, bargain with the Union for a new contract for the Unit, and post a Notice to Employees at all locations where Unit employees regularly worked. A copy of the Settlement Agreement is attached as Exhibit A.

Pomptonian entered into and executed the Settlement Agreement in "reliance upon the fact that the National Labor Relations Board shall continue to hold in abeyance the Petition filed by Pomptonian in Case No. 22-RM-755, and that upon the conclusion of the Notice posting provided for in the Agreement said Petition shall be processed by the Board." See Steven M. Swirsky's letter dated March 5, 2010, attached as Exhibit B. The understanding and agreement that the Petition would be processed after the compliance period was a key element of Pomptonian's agreement to settle the unfair labor practice charges filed by Local 32BJ.

The Settlement Agreement contains a Non-Admissions Clause which unequivocally states that "By executing this settlement agreement the Charged Party does not admit that it has violated the National Labor Relations Act, as amended." (Exhibit A)

Pursuant to the terms of the Settlement Agreement, Pomptonian posted the Board's Notice and complied with all of the terms of the Settlement Agreement, including bargaining with Local 32BJ in good faith. On November 5, 2010, Acting Regional Director Julie Kaufman issued a closing letter acknowledging that Pomptonian "has met its obligations with

regard to all terms and provisions of the Settlement Agreement.” A copy of the Region’s November 5, 2010 closing letter is attached as Exhibit C.

II. ANALYSIS

A. **There is Reasonable Cause to Believe that a Question Concerning Representation Existed at the Time the Petition Was Filed**

Pomptonian had a good-faith reasonable uncertainty as to the Union’s continued majority status under *Levitz Furniture Co.*, 333 NLRB 717 (2001) when it filed the Petition and that uncertainty still continues today. The Petition was supported by petitions signed by a majority of the employees in the bargaining unit stating that they no longer wanted to be represented by the Union. The Union however, citing *Lee Lumber & Building Materials Corp.*, 322 NLRB 175 (1977) and *HQM of Bayside*, 348 NLRB 758 (2006), argues that Pomptonian cannot rely upon its “good faith uncertainty” to support the Petition because the Company withdrew recognition before it filed the Petition and therefore the Petition was tainted. (See Union Motion at page 2) The Union’s argument is without merit. First of all, the Region investigated the Union’s allegation of taint and found it to be unsupported by the evidence. It was clearly for this reason that the Regional Director informed the parties that he was not issuing a complaint on Charge No. 22-CA-28977, which alleged that Pomptonian unlawfully sponsored the petition signed and presented to Pomptonian by a majority of the employees in the Unit. For that reason there is no reference to these allegations in the Settlement Agreement or the Notice.

Second, as noted above, the parties settled Charge No. 22-CA-29046. The Settlement Agreement, which the Union signed as a party, contained a non-admission clause and there was no finding of “taint” or any unlawful activity by Pomptonian and the Board concluded in its November 5, 2010 closing letter confirmed that Pomptonian fully complied with the terms

of the Settlement Agreement. Thus, any alleged unfair labor practice or “taint” has been remedied.

As the Board held in *Truserv Corp.* 349 NLRB 227 (2007):

... a settlement agreement is not an admission that the employer’s actions, alleged but not found to be unlawful, constituted an unfair labor practice unless such an admission is an express part of the agreement. *Consequently, the fact that the alleged actions occurred prior to the filing of the decertification petition provides no basis for a conclusion that the petition was tainted by unlawful conduct.* (emphasis added)

The Union further and erroneously argues that because the Settlement Agreement contains a directive that Pomptonian bargain with the Union, the Region cannot process the Petition.⁴ The Settlement Agreement did not preserve the Union’s majority status in perpetuity. As the Board made clear in *Levitz* in circumstances where an employer files an RM petition “the Union remains the bargaining representative, and the employer’s bargaining obligation continues, while the RM (or RD) election proceedings are underway.” 333 NLRB at 227. The Settlement Agreement, which here was entered into with Pomptonian’s express understanding that the Board would resume processing of the Petition after compliance, merely implements what the Board in *Levitz* made clear—that where an RM has been filed the Union remains the bargaining agent unless and until it is decertified. That is exactly the case here.

Finally, the Union’s counter-petition did not undermine Pomptonian’s good- faith uncertainty to support the filing the Petition. At most, the counter-petition created a potential

⁴ Under *RCA Del Caribe*, 262 NLRB 963 (1982), the Board recognizes that parties remain obligated to bargain in good faith during the pendency of an RM or RD petition and that in the event a new agreement is reached and the representative is not recertified, the agreement will be null and void, 266 NLRB at 966.

conflict with the earlier petitions, which under *Levitz* still satisfies the good-faith uncertainty test concerning the Union's continued majority status.

Another reason for adopting the "uncertainty" standard is that sometimes, as in this case, employers are presented with conflicting evidence concerning employees' support for unions. The Respondent was given a petition, apparently signed by a majority of the unit employees, stating that they no longer wanted to be represented by the Union. Two weeks later, the Union proffered evidence which, it claimed, showed majority support. It would be difficult to contend that the Respondent, faced with such conflicting evidence, believed in good faith that the Union had lost its majority status. But it would be just as hard to argue that the Respondent could not, under those circumstances, harbor uncertainty regarding the Union's majority status. We think it is justifiable for an employer in those circumstances to seek an RM election to resolve that uncertainty, yet under the good-faith belief standard, it would be unable to do so. Under the standard we adopt today, employers who are faced with such contradictory evidence will be able to obtain elections.

333 NLRB at 727.

Moreover, Pomptonian made witnesses available to the Region in Charge No. 22-CA-28977 who provided affidavits in support of Pomptonian's reasonable belief that the Union obtained employee signatures on its counter petition by fraud, coercion and other improper means and therefore the initial petitions provided by the employees to Pomptonian were still valid.

Accordingly, the Region should deny the Union's motion and resume processing the Petition.

B. The Settlement of the Unfair Labor Practice Allegations Did Not Require Dismissal of the Petition

The Board's decision in *Truserv Corp.* 349 NLRB 227 (2007) governs the Region's disposition of the Petition and sets forth the rationale as to why the Region should

continue processing the Petition. In *Truserv Corp.* the Board was faced with the issue of whether the settlement of a Section 8(a)(5) unfair labor practice charge, *which did not include a non-admissions clause*, required the dismissal of a decertification petition filed by employees after the alleged unlawful conduct by the Employer but before execution of the Settlement Agreement. The Board overturned the Acting Regional Director's administrative dismissal of the Petition and concluded that the decertification petition could be processed. In relevant part, the Board held that:

we hold that, after the unfair labor practice case has been settled, the decertification petition can be processed and an election can be held after the completion of the remedial period associated with the settlement of the unfair labor practice charge. We reach this result because the employer conduct in question is only alleged to be unlawful, and thus there is no basis on which to dismiss the petition. Further, we reach this result even if the post-petition settlement includes a contract reached between the employer and the union ... a settlement agreement is not an admission that the employer's actions, alleged but not found to be unlawful, constituted an unfair labor practice unless such an admission is an express part of the agreement. Consequently, the fact that the alleged actions occurred prior to the filing of the decertification petition provides no basis for a conclusion that the petition was tainted by unlawful conduct.

349 NLRB at 227-28. In contrast, the Board held that a petition may not be processed where (i) the execution of the settlement of an unfair labor practice comes before the filing of the petition, (ii) the RD finds that the petition was instigated by the employer, or (iii) the settlement of the unfair labor practice charge included an agreement to withdraw the petition. None of these circumstances warranting dismissal of the Petition are present in this case. To the contrary, here the settlement was with the express understanding that the Petition would be held in abeyance while Pomptonian fulfilled its obligations under the Settlement Agreement and that at such time as the Regional Director concluded it had fully complied, the Petition would be processed.

The facts in this case provide an even more compelling reason to resume processing the Petition herein. First, Pomptonian agreed to settle the unfair labor practice charges with the express understanding that the Petition would be processed following the expiration of the compliance period. Second, the Settlement Agreement contains an express non-admissions clause; thus there is no basis upon which to conclude that the Petition is tainted. Third, the Settlement Agreement did not include an agreement that the Petition would be withdrawn even though the Region and the Union were aware of the pending Petition. Fourth, the Union was a party to the Settlement Agreement.

Local 32BJ's attempt to distinguish *Truserv Corp.* because it involved an RD petition and because the settlement agreement did not include a bargaining order fails. First, the Board does not distinguish between RD and RM petitions and the Board's underlying rationale applies equally to both types of proceedings. The issue is simply whether a settlement agreement of unfair labor practice charges bars the continued processing of a petition. Thus, the Union's reliance on footnote 14 in *Truserv* in its October 15, 2010 motion to dismiss the petition is misplaced. There, the Board made the unremarkable observation that the Regional Director could have included the decertification petitioner in settlement discussions, and that without such inclusion, the petitioner's right to have the decertification petition processed cannot be waived. Here, the petitioner was a party to the negotiation of the Settlement Agreement and the Agreement itself. Pomptonian had the ability and authority to withdraw its petition if that was its intention. It clearly was not the Petitioner's intention to withdraw the Petition as part of the Settlement. To the contrary, Pomptonian entered into and executed the Settlement Agreement with the express understanding that the Region would resume processing of the Petition at the

end of the compliance period. Having found that Pomptonian fully complied with the Settlement Agreement, the Region should resume processing the Petition.

The Union's second argument, that the settlement agreement in *Truserv Corp.* did not contain a bargaining order as in *HQM of Bayside* is irrelevant. The issue is whether the Employer has been found to have violated the Act or whether it has admitted violating the Act. 349 NLRB at 228. Neither circumstance applies here. More importantly, *HQM of Bayside* did not involve the filing of an RM Petition as in this case. As noted above, in the context of an RM Petition, the Union retains its status as the employees' collective bargaining representative unless and until it is decertified by the Board.

Accordingly, the Region should resume processing the Petition so that Pomptonian employees can decide for themselves whether they want to be represented by the Union.

C. Processing of the RM Petition is Not Inconsistent with the Region's Finding That Local 32BJ Had Reestablished its Majority Status by the Filing Date of the Petition

The Region's processing of the Petition would in no way be inconsistent with the Region's "finding" that Local 32BJ had reestablished its majority status by the date of the filing of the Petition for three reasons. First, as set forth in the previous section, the Region did not make a "finding" that Pomptonian violated the Act. At most, the Region investigated the Charge and advised the parties that it was prepared to issue a complaint. There was no unfair labor practice hearing and there was no finding that Pomptonian violated the Act. Rather, Pomptonian agreed to enter into a non-admissions Settlement Agreement prior to the issuance of a complaint. Second, as demonstrated above, Pomptonian never admitted that it violated the Act. To the

contrary, the Settlement Agreement contains a non-admissions clause. Third, as Pomptonian set forth in its September 18, 2009 letter to the Region, *HQM of Bayside, LLC*, 348 NLRB 758 (2006) is materially distinguishable from the Union's petition herein because: (a) there was evidence that the employee signatures were obtained by the Union through fraud, coercion and other improper means, (b) the Union petition did not revoke any previous statement by employees to the contrary, (c) the Union petitions were undated and in fact could well have predated the petitions that the employees presented to Pomptonian; and (d) Pomptonian advised the Union of its readiness to resolve the representation issue through a Board election.

Accordingly, "absent a finding of a violation of the Act, or an admission by the employer of such violation, there is no basis for dismissing the Petition based on a settlement of alleged but unproven unfair labor practices." *Truserv Corp*, 349 NLRB at 228. Accordingly, the Region should continue its processing the Petition.

III. CONCLUSION

For all of the foregoing reasons, Pomptonian submits that the Region should dismiss the Union's motion to dismiss the Petition and resume processing of the Petition forthwith.

Dated: New York, New York
December 20, 2010

EPSTEIN BECKER & GREEN, P.C.

By: 

Steven M. Swirsky

250 Park Avenue
New York, New York 10177-1211
(212) 351-4500
Counsel for Pomptonian Food Service

EXHIBIT A

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

IN THE MATTER OF

Pomptonian Food Service 22-CA-29046 & 22-CA-29315

The undersigned Charged Party and the undersigned Charging Party, in settlement of the above matter, and subject to the approval of the Regional Director for the National Labor Relations Board, HEREBY AGREE AS FOLLOWS:

POSTING OF NOTICE — Upon approval of this Agreement and receipt of the Notices from the Region, which may include Notices in more than one language as deemed appropriate by the Regional Director, the Charged Party will post immediately in and about its plant/office, including all places where notices to employees/members are customarily posted, and maintain for 60 consecutive days from the date of posting, copies of the attached Notice (and versions in other languages as deemed appropriate by the Regional Director) made a part hereof, said Notices to be signed by a responsible official of the Charged Party and the date of actual posting to be shown thereon. In the event this Agreement is in settlement of a charge against a union, the union will submit forthwith signed copies of said Notices to the Regional Director who will forward them to the employer whose employees are involved herein, for posting, the employer willing, in conspicuous places in and about the employer's plant where they shall be maintained for 60 consecutive days from the date of posting. Further, in the event that the charged union maintains such bulletin boards at the facility of the employer where the alleged unfair labor practices occurred, the union shall also post Notices on each such bulletin board during the posting period.

COMPLIANCE WITH NOTICE — The Charged Party will comply with all the terms and provisions of said Notice.

NON-ADMISSIONS CLAUSE — By executing this settlement agreement the Charged Party does not admit that it has violated the National Labor Relations Act, as amended.

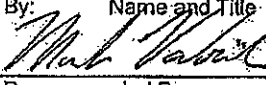
SCOPE OF THE AGREEMENT — This Agreement settles only the allegations in the above-captioned case(s), and does not constitute a settlement of any other case(s) or matters. It does not preclude persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters which precede the date of the approval of this Agreement regardless of whether such matters are known to the General Counsel or are readily discoverable. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

CONTRIBUTIONS - PENSION FUND CONTRIBUTIONS - \$1,995.52 including interest.

REFUSAL TO ISSUE COMPLAINT — In the event the Charging Party fails or refuses to become a party to this Agreement, and if in the Regional Director's discretion it will effectuate the policies of the National Labor Relations Act, the Regional Director shall decline to issue a Complaint herein (or a new Complaint if one has been withdrawn pursuant to the terms of this Agreement), and this Agreement shall be between the Charged Party and the undersigned Regional Director. A review of such action may be obtained pursuant to Section 102.19 of the Rules and Regulations of the Board if a request for same is filed within 14 days thereof. This Agreement shall be null and void if the General Counsel does not sustain the Regional Director's action in the event of a review. Approval of this Agreement by the Regional Director shall constitute withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in the above captioned case(s), as well as any answer(s) filed in response.

PERFORMANCE — Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of notice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE — The undersigned parties to this Agreement will each notify the Regional Director in writing what steps the Charged Party has taken to comply herewith. Such notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. In the event the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that no review has been requested or that the General Counsel has sustained the Regional Director. Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in the above captioned case(s).

| | | | |
|---|----------------|--|------|
| Charged Party POMPTONIAN FOOD SERVICE | | Charging Party SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ | |
| By: Name and Title  President | Date 3/5/10 | By: Name and Title | Date |
| Recommended By: Board Agent | Date | Approved By: Regional Director | Date |



NOTICE TO EMPLOYEES



POSTED PURSUANT TO A SETTLEMENT AGREEMENT APPROVED BY A REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT
FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union;
Choose representatives to bargain with us on your behalf;
Act together with other employees for your benefit and protection;
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain in good faith with Service Employees International Union, Local 32BJ (herein the Union) as the exclusive collective bargaining representative of the employees in the following bargaining unit:

All full-time and regular part-time food service employees of the Employer in the job classifications of cook, driver/food service worker, food service worker/cashier, and food service worker in connection with the Employer's provision of food services at the locations of the South Orange/Maplewood School District; but excluding employees in the job classifications not identified above, managers, confidential and clerical employees, professional employees, casual/substitute employees, employees who are school district students, temporary employees, supervisors, and guards as defined in the National Labor Relations Act.

WE WILL NOT cease contributions to the UNITE HERE Workers National Pension Fund without prior notice to the Union and without affording the Union an opportunity to negotiate and bargain.

WE WILL NOT unilaterally implement a wage increase and grant sick days to the bargaining unit without prior notice to the Union and without affording the Union an opportunity to negotiate and bargain.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive representative of our employees in the above unit with respect to wages, hours and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

WE WILL, on request, rescind any and all unilateral changes we have made in the terms and conditions of employment of the employees in the involved unit.

WE WILL make whole unit employees by making contributions to the UNITE HERE Workers National Pension Fund required under the terms of Article 26 of the collective bargaining agreement that we withheld, and WE WILL make employees whole for any losses resulting from our failure to make such payments, with interest.

POMPTONIAN FOOD SERVICE
(Employer)

Dated: 3/5/10

By: [Signature] President
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov and the toll-free number (888) 667-NLRB (6572).

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE COMPLIANCE OFFICER.

Veteran's Administration Building, NLRB, 20 Washington Place, 5th Floor, Newark, NJ 07102.
Tel (973) 645-2100. Hours of Operation: 8:30 a.m. to 3:00 p.m.

EXHIBIT B

EPSTEIN BECKER & GREEN, P.C.

ATTORNEYS AT LAW
250 PARK AVENUE
NEW YORK, NEW YORK 10177-1211
212.351.4500
FAX: 212.661.0989
WWW.EBGLAW.COM

STEVEN M. SWIRSKY
TEL: 212.351.4640
FAX: 212.878.8650
SSWIRSKY@EBGLAW.COM

March 5, 2010

VIA ELECTRONIC & US MAIL

Chevella Brown-Maynor
The National Labor Relations Board
Region 22
22 Washington Place, 5th Floor
Newark, NJ 07102-3115

Re: Service Employees International Union, Local 32 BJ and Pomptonian Food
Service
Case Nos. 22-CA-290946 and 22-CA-29315

Dear Ms. Brown-Maynor:

Enclosed please find a copy of the proposed Settlement Agreement in the above referenced Unfair Labor Practice charges, which has been signed today on behalf of Pomptonian Food Service ("Pomptonian") by company President Mark Vidovich.

Pomptonian has agreed to enter into and executed this Agreement in reliance upon the representation of charging party Local 32BJ SEIU that this Agreement resolves any and all claims of unfair labor practice activity that have been or could have been raised by it against Pomptonian with respect to any matter occurring through this date. In addition, Pomptonian has agreed to enter into and has executed this Agreement in reliance upon the fact that the National Labor Relations Board shall continue to hold in abeyance the Petition filed by Pomptonian in Case No. 22-RM-755, and that upon the conclusion of the Notice posting period provided for in the Agreement said Petition shall be processed by the Board.

It is our understanding that the Regional Director shall at this time convey the Agreement to the Charging Party for it to sign and enter into the Agreement as well, and that if the Charging Party does not enter into the Agreement on a timely basis, i.e. within seven days, that the Agreement and the settlement shall be approved as a unilateral settlement. I ask that you please keep me apprised as to whether and when the Charging Party enters into the Agreement and the date that the Regional Director approves the Agreement. We understand that the Region

ATLANTA • CHICAGO • HOUSTON • LOS ANGELES • MIAMI • NEWARK
NEW YORK • SAN FRANCISCO • STAMFORD • WASHINGTON, DC

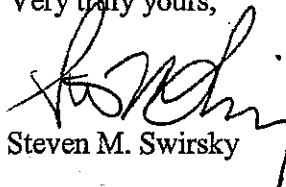
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EPSTEIN BECKER GREEN WICKLIFF & HALL, P.C. IN TEXAS ONLY

Chevella Brown-Maynor, Esq.
March 5, 2010
Page 2

will now prepare and forward to Pomptonian the actual Notices for posting following the approval of the Agreement.

Very truly yours,

A handwritten signature in black ink, appearing to read "S. Swirsky", written over the typed name.

Steven M. Swirsky

SMS:sgw
Enclosure



NOTICE TO EMPLOYEES



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POMPTONIAN FOOD SERVICE
(Employer)

Dated: 3/5/10

By: [Signature]

(Representative) (Title)

President

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UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

IN THE MATTER OF

Pomptonian Food Service 22-CA-29046 & 22-CA-29315

The undersigned Charged Party and the undersigned Charging Party, in settlement of the above matter, and subject to the approval of the Regional Director for the National Labor Relations Board, HEREBY AGREE AS FOLLOWS:

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CONTRIBUTIONS - PENSION FUND CONTRIBUTIONS - \$1,995.62 including interest.

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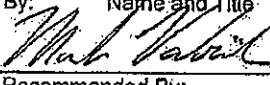
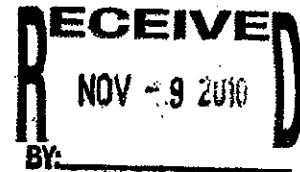
| | | | |
|---|----------------|--|------|
| Charged Party POMPTONIAN FOOD SERVICE | | Charging Party SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ | |
| By:  Name and Title President | Date 3/5/10 | By: _____ Name and Title | Date |
| Recommended By: Board Agent | Date | Approved By: Regional Director | Date |

EXHIBIT C



United States Government
NATIONAL LABOR RELATIONS BOARD
Region 22
20 Washington Place, 5th Floor
Newark, NJ 07102-3115
Telephone: 973-645-2100



November 5, 2010

Steven M. Swirsky, Esq.
Epstein Becker & Green PC
250 Park Avenue
New York, NY 10177

Re: Pomptonian Food Service
Cases 22-CA-29046, 22-CA-29315

Dear Mr. Swirsky:

After a review of all aspects of compliance in the above-captioned case, it has been determined that the Employer has met its obligations with regard to all terms and provisions of the Settlement Agreement in this matter.

Accordingly, this matter is hereby closed and will remain closed, conditioned upon continued compliance. In the event that subsequent violations of the National Labor Relations Act occur, this matter may be reopened.

Very truly yours,

Julie Kaufman
Acting Regional Director

cc: Rich Ward, Director of Operation
Pomptonian Food Service
3 Edison Place
Fairfield, NJ 07004

Service Employees International
Union Local 32BJ
1 Washington Park 12th Floor, Suite 1203
Newark, NJ 07102

Andrew Strom, Esq.
Associate General Counsel
Service Employees International Union, 32B-32J
101 Avenue of Americas
New York, NY 10013



NOTICE TO EMPLOYEES



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POMPTONIAN FOOD SERVICE
(Employer)

Dated: _____ By: _____
(Representative) (Title)

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EXHIBIT H

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

POMPTONIAN FOOD SERVICE

Employer-Petitioner

and

Case 22-RM-755

LOCAL 32BJ, SEIU

Intervenor/Union

ORDER DENYING UNION'S MOTION
TO DISMISS PETITION

The Petition in this matter was filed on October 30, 2009, but processing of the Petition was pended because of two related unfair labor practice charges filed by the Union which are discussed below. Upon resumption of processing of the Petition following settlement of those cases, counsel for the Union submitted a letter requesting that the instant Petition be dismissed. A copy of the letter is attached and I am considering the letter as a Motion to dismiss the Petition. On December 1, 2010, the undersigned issued a Notice to Show Cause to the parties soliciting their legal positions and arguments as to whether the instant Petition warrants continued processing. I have carefully considered the Union's Motion and the parties' respective responses to the Notice to Show Cause. For the reasons stated below, I have determined that the Union's Motion should be denied and that processing of the Petition should be resumed.

The relevant chronology of events leading up to the filing of the above petition is summarized as follows. In or about late April, 2009, the Employer was presented with an employee-signed petition indicating that a majority of the unit employees no longer wished to be represented by

the Union. The Employer sent a letter to the Union dated May 11, 2009 stating that it intended to withdraw recognition from the Union based on the petition, effective at the expiration of the contract on August 31, 2009. Sometime between May 11th and August 31st, the Union re-established its majority strength among the unit employees. The Employer asserted that the Union had coerced employees into supporting the Union and decided to withdraw recognition on August 31st. The Employer subsequently filed this RM Petition on October 9, 2009, based on the employee-signed petition it had received in late April, 2009.

The relevant unfair labor practice charges are summarized as follows. The Union filed a charge in case 22-CA-29046 on August 5, 2009, alleging that the Employer unlawfully failed and refused to bargain with the Union by refusing to negotiate a successor collective bargaining agreement and by unlawfully withdrawing recognition from the Union at a time when it could not be demonstrated that a majority of the unit employees no longer supported the Union as their bargaining representative in violation of Section 8(a)(1) and (5) of the Act. The Region found merit to this charge because the Union had re-established its majority strength at the time the Employer withdrew recognition and the Employer had not established that the Union coerced employees in doing so. The Region subsequently issued a Complaint in this case on January 29, 2010.

The Union filed a second charge in case 22-CA-29315 on February 9, 2010, alleging that the Employer unlawfully failed and refused to bargain with the Union by unilaterally (1) discontinuing to make pension fund contributions, (2) implementing wage increases and (3) granting sick days to employees. After a full investigation of these charges, the Region also found merit to these allegations. Subsequently, on March 9, 2010, the undersigned approved a settlement agreement entered into by the parties that provided a full remedy of the allegations in

both charges, including an affirmative bargaining obligation and the posting of a Notice to Employees. Thereafter, this office implemented the terms of the Settlement Agreement and the unfair labor practice cases were closed on compliance on November 5, 2010.

The Union contends that the settlement of the unfair labor practices requires dismissal of the instant Petition because it contains an affirmative bargaining order. The Union also contends that the instant Petition should be dismissed because the Employer's unlawful withdrawal of recognition precludes a finding that it acted in "good faith" when it filed the Petition and because the Union had re-established its majority strength at the time the Petition was filed.

The Employer contends that processing of the instant Petition should be resumed because (1) settlement of the unfair labor practice charges does not require dismissal of the Petition and the approved Informal Settlement Agreement expressly included a non-admissions clause specifying that the Employer did not admit to the conduct alleged in the charges, (2) the instant Petition was filed in a timely manner, and (3) the alleged recognition-related conduct by the Employer postdates the showing of interest and should not affect the filing of the Petition and does not warrant dismissal of the Petition.

Contrary to the Union's allegation that the instant Petition was tainted because the Employer unlawfully withdrew recognition of the Union before it filed the Petition, the investigation herein revealed that the Showing of Interest ("showing"), submitted in support of this Petition, predated the Employer's unlawful conduct that was the subject of the unfair labor practices. Thus, the recognition-related conduct by the Employer that postdates the showing of interest could not affect the filing of the Petition and does not warrant dismissal of the Petition.

Regarding the Union's assertion that the presence of an affirmative bargaining order in the settlement requires dismissal of the Petition, in *Truserv Corp.*, 349 NLRB 227 (2007), the

Board under similar circumstances overturned the Acting Regional Director's administrative dismissal of a decertification petition in the face of a settlement of a Section 8(a)(5) unfair labor practice charge.

In the instant case, the Settlement Agreement executed by the parties and approved by the Regional Director contained an express nonadmissions clause and under *Truserve*, provides no basis for dismissal of the Petition.

In addition, although the Union had re-established its majority status at the time the Petition was filed, under the Board's reasoning in *Levitz Furniture Co.* 333 NLRB 717 (2001), these circumstances establish the necessary "good faith uncertainty" needed to justify an Employer's filing of an RM petition.

Under these circumstances and noting that the referenced unfair labor practice allegations by the Union against the Employer have been fully remedied, I issue the following:

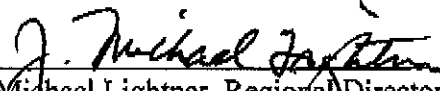
IT IS HEREBY ORDERED that the Union's Motion to Dismiss the Petition is denied. Accordingly, processing of the instant Petition shall resume.¹

¹ **Right to Request Review:** Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 - 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on January 25, 2011, at 5 p.m. (ET), unless filed electronically. Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically. If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gov tab and then click on E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the request for review rests exclusively with the

Issued at Newark, New Jersey, this 13th day of January, 2011.


J. Michael Lightner, Regional Director
National Labor Relations Board, Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102

sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.



SERVICE EMPLOYEES
INTERNATIONAL UNION
CTW/CLC

MICHAEL R. FISHMAN
President

KEVIN J. DOYLE
Executive Vice President

NÉCTOR J. FIGUEROA
Secretary-Treasurer

VICE PRESIDENTS
KYLE BRAGG
GEORGE FRANCISCO
LENORE FRIEDLANDER
BRIAN LAMBERT
VALARIE LONG

LARRY ENGELSTEIN
Assistant to the President

Local 32BJ Headquarters
101 Avenue of the Americas
New York, NY 10013-1991
212.388.3800

Office of the General Counsel

SEIU Local 32BJ
101 Avenue of the Americas
19th Floor
New York, NY 10013-1906
Fax: 212.388.2062

Writer's Direct Dial: 212.388.3025

October 15, 2010

Via Fax (973) 645-3852 Only

Michael Lightner
Regional Director
NLRB Region 22
20 Washington Place, 5th floor
Newark, NJ 07102-2570

Re: Pomptonian Food Service
Case 22-RM-755

Dear Mr. Lightner:

I am writing on behalf of Service Employees International Union, Local 32BJ ("Local 32BJ" or "the Union") to set forth the Union's views as to why the above-referenced petition should be dismissed.

The petition was filed on October 30, 2009, but processing of the petition was blocked by the unfair labor practice in Case 22-CA-29046. The Region ultimately found merit to the charge that Pomptonian had prematurely withdrawn recognition from Local 32BJ, and the Region entered into a settlement with Pomptonian that imposed an affirmative bargaining obligation on Pomptonian.

ARGUMENT

A. The Settlement of the Unfair Labor Practice Requires Dismissal of the RM Petition.

The remedy in the ULP case was modeled on the remedy imposed by the Board in *HQM of Bayside, LLC*, 348 NLRB 758 (2006). In *HQM of Bayside*, the Board explained that one purpose of imposing an affirmative bargaining obligation is to "remove[] the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union, and it ensures that the Union will not be pressured to achieve immediate results at the bargaining table – results that might not be in the employees' best interests." *Id.* at 762. Where the Board or the Region imposes an affirmative bargaining obligation, by definition, there is no longer a question concerning representation, and thus, on that basis the RM petition must be dismissed.

The Board's decision in *Truserv Corp.*, 349 NLRB 227 (2007) is not to the contrary for two reasons. In *Truserv*, the Board held that the settlement of an 8(a)(5) charge did not provide a basis for dismissing a decertification petition filed by employees prior to the settlement. *Truserv* has no application here because it

October 15, 2010

Page 2

involved an RD petition rather than an RM petition. The Board majority in *Truserv* expressed concern that "the petitioner be bound to a settlement by others that purports to waive the petitioner's right under the Act to have the decertification petition processed." *Id.* at 232, n. 14. Here, there is no concern about the settlement waiving the rights of employees because the RM petition was filed by the employer. A second reason why *Truserv* does not apply here is that the settlement in *Truserv* did not include an affirmative bargaining obligation imposed by the Board. Here, as explained above, the affirmative bargaining obligation in the settlement precludes any question concerning representation.

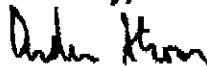
B. The RM Petition Should Be Dismissed Because it Was Tainted by the Employer's Unlawful Conduct.

Apart from the question of whether the settlement necessitates dismissal of the decertification petition, there is a separate basis for dismissing the decertification petition – the petition was tainted by the unfair labor practice that gave rise to the settlement. The facts are as follows: Pomptonian announced on May 11, 2009 that it intended to withdraw recognition upon the expiration of the collective bargaining agreement effective August 31, 2009. After that announcement, Pomptonian unlawfully refused to bargain a successor agreement. As explained by the Board in *HQM of Bayside*, Pomptonian took those actions at its peril because its actions would only be lawful if the Union had actually lost majority support by the time the contract expired. Pomptonian did not file its RM petition until October 30, 2009 – more than five months after the anticipatory withdrawal of recognition that turned out to be unlawful.

Even if Pomptonian was relying upon a showing of interest that predated its unlawful acts, the RM petition is still tainted because an employer may only file an RM petition where it can demonstrate "good-faith reasonable uncertainty" as to the union's continuing majority status. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 717 (2001). Pomptonian was required to harbor its good faith uncertainty at the time it filed its petition. Yet, Pomptonian's unlawful acts precluded any good faith uncertainty. *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996) ("Any such doubt must be raised in a context free of unfair labor practices of the sort likely, under all the circumstances to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself"). It may well be that in May 2009, Pomptonian did have good faith uncertainty about the wishes of its employees. But, its unlawful withdrawal of recognition was conduct that "would tend to unfairly undermine continuing support for the Union." *HQM of Bayside*, 348 NLRB at 761; accord *Lee Lumber*, 322 NLRB at 177. Thus, if not for Pomptonian's unlawful acts, support for the Union by October might well have rebounded to the point where there would be no doubt whatsoever about the Union's majority status.

Since Pomptonian's unlawful acts precluded the existence of any good faith doubt, its petition must be dismissed.

Sincerely,



Andrew Strom
Associate General Counsel

EXHIBIT I

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

POMPTONIAN FOOD SERVICE
Employer-Petitioner

and

Case 22-RM-755

LOCAL 32BJ, SEIU
Union

ORDER REMANDING

Union's Request for Review of the Regional Director's Order Denying Union's Motion to Dismiss the petition is granted as it raises substantial issues warranting review with regard to the circumstances surrounding the settlement agreement in Cases 22-CA-29046 and 22-CA-29315. The Employer's opposition represents that during settlement negotiations it was told by the Region that if the Employer agreed to settle the unfair labor practice allegations, the Region would continue to hold the petition in abeyance, and that upon the conclusion of the Notice posting and compliance period, the petition would be processed. Accordingly, we remand this case for the Regional Director and the Union to address the Employer's representations, and if necessary, for the Regional Director to issue a decision.

| | |
|-------------------|----------|
| WILMA B. LIEBMAN, | CHAIRMAN |
| CRAIG BECKER, | MEMBER |
| BRIAN E. HAYES, | MEMBER |

Dated, Washington, D.C., March 24, 2011.

EXHIBIT J

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

POMPTONIAN FOOD SERVICE
Employer-Petitioner

RECEIVED
MAY - 4 2011
BY: _____

and

Case 22-RM-755

LOCAL 32BJ, SEIU
Union

SUPPLEMENTAL ORDER ON REMAND


On March 24, 2011, the Board issued an Order Remanding the above-captioned case for the Regional Director and the Union to address the Employer's representations concerning the circumstances surrounding the settlement agreement in Cases 22-CA-29046 and 22-CA-29315, as they relate to this case. Specifically mentioned is the Employer's representation that it was told by the Region that if the Employer agreed to settle the unfair labor practice allegations, the Region would continue to hold the above petition in abeyance and that upon the conclusion of the Notice posting and compliance period, the petition would be processed.

Thereafter, by letter to the undersigned dated April 21, 2011, copy attached hereto, counsel for the Union submitted its response to the Board's Order Remanding. In his response on behalf of the Union, counsel advised that, prior to entering into the settlement agreement referenced above, it was never directly conveyed, nor was the Union otherwise informed that the Region would resume processing of the instant petition upon the conclusion of the Notice posting period provided for in the settlement agreement. The Union urges that the Employer's representations regarding the Region's actions in this regard should have no bearing on the Board's ultimate disposition of the matter and reiterates its argument that the petition should be

dismissed. The Employer's request for an opportunity to formally reply to the Union's response is hereby denied as not being within the scope of the Board's limited remand instructions.

A review of the case files and all relevant documentation contained therein confirms the Employer's representation that during settlement discussions the Region advised counsel for the Employer that it was the Region's intention to resume processing of the petition at the end of the Notice posting period, after compliance with the terms of the settlement in Cases 22-CA-29046 and 22-CA-29315. The Region's position in this regard was based on the particular facts of the case, including the undisputed fact that the Showing of Interest submitted in support of the petition predated the meritorious unfair labor practices that ultimately were remedied in the settlement agreement and Notice posting.

Dated at Newark, New Jersey this 2nd day of May, 2011.


J. Michael Lightner, Regional Director
National Labor Relations Board, Region 22
20 Washington Place, 5th Floor
Newark, NJ 07102

Attachments



SERVICE EMPLOYEES
INTERNATIONAL UNION
CTW, CLC

MICHAEL P. FISHMAN
President

KEVIN J. DOYLE
Executive Vice President

HÉCTOR J. FIGUEROA
Secretary-Treasurer

VICE PRESIDENTS
KYLE BRAGG
GEORGE FRANCISCO
LENORE FRIEDLAENDER
BRIAN LAMBERT
VALARIE LONG

LARRY ENGELSTEIN
Assistant to the President

Local 32BJ Headquarters
101 Avenue of the Americas
New York, NY 10013-1991
212 388.3800

Office of the General Counsel

SEIU Local 32BJ
101 Avenue of the Americas
19th Floor
New York, NY 10013-1906
Fax: 212.388.2062

Writer's Direct Dial: 212.388.3025

April 21, 2011

Via Fax (973) 645-3852 Only

J. Michael Lightner
Regional Director
NLRB Region 22
20 Washington Place, 5th floor
Newark, NJ 07102

Re: Pomptonian Food Service
Case 22-RM-755

Dear Mr. Lightner:

This letter is submitted on behalf of Service Employees International Union, Local 32BJ ("Local 32BJ" or "the Union") in response to the Notice issued on April 12, 2011 in the above-referenced case.

Pomptonian Food Service ("the Employer") has submitted a self-serving letter dated March 5, 2010 claiming that it entered into the settlement agreement in Cases 22-CA-29046 and 22-CA-29315 "in reliance upon the fact that ... upon the conclusion of the Notice posting period provided for in the Agreement [the RM petition] shall be processed by the Board."

If there were ever any such representations made by anyone at Region 22, Local 32BJ was never informed of this condition prior to entering into the settlement agreement. To the contrary, Local 32BJ's understanding was that the Settlement Agreement represented the complete agreement of the parties with regard to the settlement of the unfair labor practices. The first time Local 32BJ learned of these alleged representations was when the Employer referred to them in its response to the December 1, 2010 Order to Show Cause in this case.

Moreover, the Employer's March 5, 2010 letter represents an attempt to alter another material term of the settlement. The Employer asserts in its letter that it was entering into the agreement on the understanding that the Region would process the RM petition upon the conclusion of the Notice posting period. While the Employer refers to this as the "compliance period" in its brief to the Board, this is an incorrect statement regarding the compliance period. The settlement of the unfair labor practice charge included an affirmative bargaining obligation. Thus, no question concerning representation could be raised until there had been a "reasonable period of time sufficient to allow the good faith bargaining that [Pomptonian's] unlawful withdrawal of recognition cut short. *HQM of Bayside*, 348 NLRB 758, 761 (2006). If the Board were to accept the Employer's logic, then simply by virtue of the Employer's self-serving March 5, 2010 letter, the Board

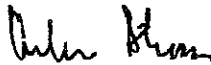
April 21, 2011

Page 2

would have been required to process the Employer's RM petition upon the conclusion of the sixty-day posting period even though there had not yet been a reasonable period of time for bargaining.

Since the Employer's representations in its March 5, 2010 letter were never conveyed to Local 32BJ prior to Local 32BJ entering into the settlement agreement, and since they were not made a part of the settlement agreement, they should have no bearing on the Board's disposition of the RM petition.

Respectfully submitted,



Andrew Strom
Associate General Counsel

cc. Steven M. Swirsky, via fax (212) 878-8650

EXHIBIT K

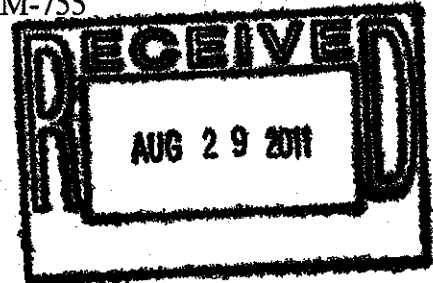
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

POMPTONIAN FOOD SERVICE
Employer-Petitioner

and

Case 22-RM-755

LOCAL 32BJ, SEIU
Union



ORDER REMANDING

On March 24, 2011, the Board issued an Order Remanding this case to the Regional Director requesting that the Regional Director and the Union address representations in the Employer's opposition to the Union's request for review of the Regional Director's Order Dismissing the petition. On May 2, 2011, the Regional Director issued a Supplemental Order on Remand addressing the Board's Order.

The peculiar and unique facts of this case present a situation in which no outcome is completely fair to all parties. The problem arises out of the dual role of the Board's regional directors who, on the one hand, act as agents of the General Counsel under Section 10 of the Act in investigating, prosecuting, and, most relevant for our purposes here, settling unfair labor practice charges and, on the other hand, act as agents of the Board under Section 9 of the Act in processing petitions and conducting elections. In this case, in the course of settling unfair labor practice charges as an agent of the General Counsel, the Regional Director made a representation about what action he would take in respect to a pending petition. The Employer stated that it was told by the Region that if the Employer agreed to settle the unfair labor practice allegations, the Region would continue to hold the petition in abeyance and that, upon the conclusion of the Notice posting and compliance period, the petition would be processed. The Region has confirmed this representation was made to the Employer. Neither the Board nor the incumbent and Charging Party Union had knowledge of the representation and it was not embodied in the informal settlement agreement that was not approved by the Board. Thus, the representation is not binding on either the Union or the Board. Nevertheless, the representation is likely to have been a factor in the Employer's decision to agree to the settlement of the unfair labor practice charges.

Absent the representation, we would reverse the Regional Director's decision and direct that he dismiss the petition based on the terms of the settlement agreement. We believe it is inconsistent for the Employer in the settlement agreement to agree to recognize the Union as the majority representative while simultaneously alleging in an employer petition that it has good-faith, reasonable uncertainty as to the Union's majority status. This is particularly true here where the showing of interest was submitted to the Employer and the petition was filed before the Employer agreed to recognize the Union

was filed and (2) whether Levitz or other Board precedent requires any other form of good faith at the time the petition was filed and, if so, whether the requisite good faith was absent based on the earlier withdrawal of recognition. In considering these questions, we instruct the Regional Director not to rely on the settlement agreement for the reasons explained above.¹

Accordingly, we remand this case to the Regional Director for action consistent with this order.

WILMA B. LIEBMAN, CHAIRMAN

CRAIG BECKER, MEMBER

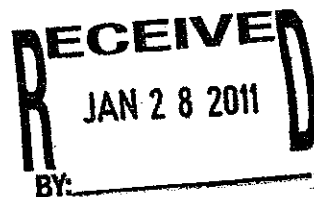
BRIAN E. HAYES, MEMBER

Dated, Washington, D.C. August 24, 2011.

¹ Member Hayes agrees with his colleagues to remand this case for additional factual findings. However, he does not agree that this concededly unique and peculiar matter can be properly decided without reference to the settlement agreement and the representations made with respect thereto. Thus, in his view, the Regional Director, regardless of his findings on the two questions posed, must additionally decide whether he is equitably estopped from acting in any manner contrary to the representations made to the Employer at the time of the settlement agreement and the holding in abeyance of the petition during the compliance period.

EXHIBIT L

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22



POMPTONIAN FOOD SERVICE

Employer-Petitioner

and

LOCAL 32-BJ, SEIU

Union

CASE NO. 22-RM-755

NOTICE OF REPRESENTATION HEARING

The Petitioner, above named, having heretofore filed a Petition pursuant to Section 9(c) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151 et seq., copy of which Petition is hereto attached, and it appearing that a question affecting commerce has arisen concerning the representation of employees described by such Petition.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, on the 10th of February, 2011 at 10:00 a.m. on the **5th FLOOR 20 WASHINGTON PLACE, NEWARK, NEW JERSEY** and on such consecutive days thereafter, a hearing will be conducted before a hearing officer of the National Labor Relations Board upon the question of representation affecting commerce which has arisen, at which time and place the parties will have the right to appear in person or otherwise, and give testimony. *(Form NLRB-4669, Statement of Standard Procedures in Formal Hearings Held Before The National Labor Relations Board Pursuant to Petitions Filed Under Section 9 of The National Labor Relations Act, as Amended, is attached.)*

Signed at Newark, New Jersey, on the 25th day of January 2011.



/s/ J. Michael Lightner
Regional Director, Region 22
National Labor Relations Board

**SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD BEFORE
THE NATIONAL LABOR RELATIONS BOARD PURSUANT TO PETITIONS FILED
UNDER SECTION 9 OF THE NATIONAL LABOR RELATIONS ACT**

The hearing will be conducted before a Hearing Officer of the National Labor Relations Board.

Parties may be represented by an attorney or other representative and present evidence relevant to the issues. All parties appearing before this hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.603, should notify the Regional Director as soon as possible and request the necessary assistance.

An official reporter will make the only official transcript of the proceedings and all citations in briefs or arguments must refer to the official record. *(Copies of exhibits should be supplied to the Hearing Officer and other parties at the time the exhibit is offered in evidence.)* After the close of the hearing, one or more of the parties may wish to have corrections made in the record. All such proposed corrections, either by way of stipulation or motion, should be forwarded to the Regional Director or to the Board in Washington *(if the case is transferred to the Board)* instead of to the Hearing Officer, inasmuch as the Hearing Officer has no power to make any rulings in connection with the case after the hearing is closed. All matter that is spoken in the hearing room will be recorded by the official reporter while the hearing is in session. In the event that any party wishes to make off-the-record remarks, requests to make such remarks should be directed to the Hearing Officer and not to the official reporter.

Statements of reasons in support of motions or objections should be as concise as possible. Objections and exceptions may, on appropriate request, be permitted to stand to an entire line of questioning. Automatic exceptions will be allowed to all adverse rulings.

All motions shall be in writing or, if made at the hearing, may be stated orally on the record and shall briefly state the order of relief sought and the grounds for such motion. An original and two copies of written motions shall be filed with the Hearing Officer and a copy thereof immediately shall be served on the other parties to the proceeding.

The sole objective of the Hearing Officer is to ascertain the respective positions of the parties and to obtain a full and complete factual record on which the duties under Section 9 of the National Labor Relations Act may be discharged by the Regional Director of the Board. It may become necessary for the Hearing Officer to ask questions, to call witnesses, and to explore avenues with respect to matters not raised by the parties. The services of the Hearing Officer are equally at the disposal of all parties to the proceedings in developing the material evidence.

At the close of hearing, any party who desires to file a brief may do so in the appropriate manner described below.

1. Briefs filed with the Regional Director

Unless transfer of the case to the Board is announced prior to close of hearing, the brief should be filed in duplicate with the Regional Director. A copy must also be served on each of the other parties and proof of such service must be filed with the Regional Director at the time the briefs are filed. Briefs submitted are to be double-spaced on 8½ by 11 inch paper.

The briefs shall be filed within 7 days after the close of the hearing unless an extension of time, not to exceed an additional 14 days on request made for good cause, before the hearing closes, is granted by the Hearing Officer. Briefs must be filed in accordance with the provisions of Section 102.111(b) of the Board's Rules. Facsimile transmission of briefs is not permitted.

A request for an extension of time made after the close of the hearing must be received by the Regional Director, in writing, as much in advance of the date the briefs are due as possible and copies thereof must be served on the other parties by the same or faster method as used to file with the Regional Director (see 102.114 of Board's Rules).

INTERNET
FORM NLRB-502
(2-08)UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

FORM EXEMPT UNDER 44 U.S.C.

DO NOT WRITE IN THIS SPACE

Case No.

22-RM-755

Date Filed

10/30/2009

INSTRUCTIONS: Submit an original of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

The Petitioner alleges that the following circumstances exist and requests that the NLRB proceed under its proper authority pursuant to Section 9 of the NLRA.

1. PURPOSE OF THIS PETITION (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)
- ☐ RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- ☒ RM-REPRESENTATION (EMPLOYER PETITION) - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- ☐ RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE) - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- ☐ UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES) - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- ☐ UC-UNIT CLARIFICATION - A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees: (Check one) ☐ In unit not previously certified. ☐ In unit previously certified in Case No. _____
- ☐ AC-AMENDMENT OF CERTIFICATION - Petitioner seeks amendment of certification issued in Case No. _____
- Attach statement describing the specific amendment sought.

2. Name of Employer

Pomptonian Food Service

Employer Representative to contact

Mark Vidovich

Tel. No.

973-882-8070

3. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)

3 Edison Place, Fairfield, NJ 07004

Fax No.

973-882-6645

4a. Type of Establishment (Factory, mine, wholesaler, etc.)

School Food Service

4b. Identify principal product or service

Food Service

Cell No.

e-Mail mvidovich@pomptonian.com

5. Unit Involved (In UC petition, describe present bargaining unit and attach description of proposed clarification.)

Included All full time and part time food service employees of Pomptonian employed in connection with its provision of food services in the South Orange Maplewood School District.

Excluded Managers, confidential and clerical employees, professional employees, casual/substitute employees, employees who are school district students, temporary employees, supervisors, and guards as defined in the National Labor Relations Act

6a. Number of Employees in Unit:

Present

Proposed (By UC/AC)

6b. Is this petition supported by 30% or more of the employees in the unit? ☐ Yes ☐ No
*Not applicable in RM, UC, and AC7a. ☐ Request for recognition as Bargaining Representative was made on (Date) _____ (If no reply received, so state)7b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the Act. _____ and Employer declined

8. Name of Recognized or Certified Bargaining Agent (If none, so state.)

Address

Affiliation

SEIU

Tel. No.

Date of Recognition or Certification

Cell No.

Fax No.

e-Mail

9. Expiration Date of Current Contract. If any (Month, Day, Year)

8/31/09

11a. Is there now a strike or picketing at the Employer's establishment(s) involved? Yes ☐ No ☒

10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop (Month, Day and Year)

11b. If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of (Insert Name) _____ organization, of (Insert Address) _____

12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. (If none, so state) _____ Since (Month, Day, Year) _____ a labor

Name

Address

Tel. No.

Fax No.

Cell No.

e-Mail

Local 32BJ, SEIU One Washington Park
Newark, NJ

13. Full name of party filing petition (If labor organization, give full name, including local name and number)

14a. Address (street and number, city, state, and ZIP code)

3 Edison Place, Fairfield, NJ 07004

14b. Tel. No.

EXT

14c. Fax No.

14d. Cell No.

14e. e-Mail

15. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (to be filled in when petition is filed by a labor organization)

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print)

Steven M. Swirsky

Signature

Address (street and number, city, state, and ZIP code)

250 Park Avenue, New York, NY 10177

Tel. No. 212.351.4640

Title (if any)

Fax No. 212.878.8650

e-Mail sswirsky@etglaw.com

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

** TOTAL PAGE.03 **

NATIONAL LABOR RELATIONS BOARD

NOTICE

Case No. 22-RM-755

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements **will not be granted** unless good and sufficient grounds are shown **and** the following requirements are met:

- (1) The request must be in writing. An original and two copies must be served on the Regional Director;
- (2) Grounds thereafter must be set forth in **detail**;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertain in advance by the requesting party and set forth in the request; **and**
- (5) Copies must be simultaneously served on all other parties (*listed below*), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

REGULAR MAIL

Mr. Mark Vidovich
Pomptonian Food Service
3 Edison Place
Fairfield, NJ 07004

Jeffrey J. Corradino, Esq.
Jackson Lewis, LLP
220 Headquarters Plaza
East Tower, 7th Floor
Morristown, NJ 07960

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Case Assigned to Board Agent Kristi Bean
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

POMPTONIAN FOOD SERVICE

Employer-Petitioner

and

Case 22-RM-755

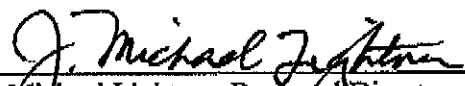
LOCAL 32-BJ, SEIU

Union

ORDER POSTPONING HEARING

IT IS HEREBY ORDERED that the Hearing in the above-captioned matter which was scheduled for February 10, 2011, is postponed indefinitely in order to await the ruling on the Union's Request for Review of the Region's Order Denying Union's Motion to Dismiss Petition.

Signed at Newark, New Jersey this 4th day of February, 2011.


J. Michael Lightner, Regional Director
National Labor Relations Board, Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102